

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in June 2017**

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to [wvgb@wv.gov](mailto:wvgb@wv.gov).

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

**TOPICAL INDEX**  
**HIGHER EDUCATION EMPLOYEES**

---

**KEYWORDS:** Termination; Sexual Harassment Policy; Sexual Misconduct; Hostile Work Environment; Hearsay; Sexual Touching; Retaliation Against Accuser; False Statement

**CASE STYLE:** Braga v. BlueRidge Community and Technical College  
DOCKET NO. 2017-1685-BRCTC (6/11/2017)

**PRIMARY ISSUES:** Whether Respondent proved any of the charges against Grievant.

**SUMMARY:** Grievant's employment was terminated by Respondent for sexual harassment, that is, touching a person who was on campus, but who was not a student or employee at the time, "on her vagina external to her jeans without solicitation or consent." The termination letter also states that Grievant provided a false statement during a formal investigation, and that she had sent a retaliatory text message to the complainant. Respondent failed to prove the charges against Grievant.

---

**KEYWORDS:** Termination; Theft; Gross Misconduct; Mitigation; Prospects for Rehabilitation

**CASE STYLE:** Sviridenko v. West Virginia University  
DOCKET NO. 2017-1771-WVU (6/15/2017)

**PRIMARY ISSUES:** Whether Respondent had good cause to terminate Grievant.

**SUMMARY:** Grievant's employment was terminated by Respondent for theft. Grievant admitted to the misconduct, but argued the penalty imposed was too severe, pointing to her offer of restitution, counseling, and community service, and her statement that she was remorseful, and she could be rehabilitated. Respondent no longer trusts Grievant. Grievant did not demonstrate that the penalty imposed was disproportionate to the offense.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

---

**KEYWORDS:** Motion To Dismiss; Untimely Filed; Continuing Damage; Salary

**CASE STYLE:** Smith v. Lincoln County Board of Education

DOCKET NO. 2016-1877-LinED (6/14/2017)

**PRIMARY ISSUES:** Whether grievance was timely filed.

**SUMMARY:** Grievant was employed by Respondent, Lincoln County Board of Education. Grievant first filed this grievance on June 30, 2016, challenging salary determinations dating as far back as fifteen to seventeen years ago. Grievant has now retired and contesting prior salary determinations. It is established that this grievance was not timely filed, and Grievant has not offered any lawfully adequate justification or excuse for the extreme delay. This grievance is DISMISSED.

---

**KEYWORDS:** Written Reprimand; Policy; Reporting A Serious Incident; Employee Code Of Conduct; Reprisal

**CASE STYLE:** Hoffman v. Mingo County Board of Education

DOCKET NO. 2016-1206-MinED (6/5/2017)

**PRIMARY ISSUES:** Whether Respondent proves a written reprimand was justified and whether the reprimand was an act of reprisal.

**SUMMARY:** Grievant contests a written reprimand he received for failing to inform the superintendent or central office of a serious accident which occurred involving students in the Board's LPN program. Grievant notes that he reported the incident after he made his initial investigation which took two days. He argues that there is not a specific time set out in policy for reporting such matters. He further argues that the reprimand was an act of reprisal for his requesting a transfer hearing and prevailing in a grievance related to the reduction of his employment term. Respondent proved that there is an expectation that serious accidents be reported to the central office immediately, that Grievant knew of this expectation and did not comply. Respondent also proved that it had a legitimate, non-retaliatory reason for issue the written reprimand to Grievant.

**KEYWORDS:** Motion to Dismiss; Voluntary Resignation; Moot; Advisory Opinion

**CASE STYLE:** Marcum v. Mingo County Board of Education

DOCKET NO. 2017-1502-MinED (6/14/2017)

**PRIMARY ISSUES:** Whether Respondent has proven this grievance is moot.

**SUMMARY:** Grievant was employed by Respondent as a Counselor. Grievant protests her non-selection for the position of Principal of Mingo Central High School. Respondent moved to dismiss the grievance as moot due to Grievant's voluntary resignation from employment. Respondent has proven the grievance is moot and must be dismissed due to Grievant's voluntary resignation from employment. Accordingly, the grievance is dismissed.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

---

**KEYWORDS:** Termination; Suspension; Training; Policy and Procedure; Willful Neglect of Duty; Insubordination; Arbitrary and Capricious; Mitigation

**CASE STYLE:** Pilkington v. Raleigh County Board of Education

DOCKET NO. 2017-1498-RaIED (6/15/2017)

**PRIMARY ISSUES:** Whether Respondent had good cause to terminate Grievant's contract.

**SUMMARY:** Grievant bus operator collided with a truck at an intersection, while transporting 21 students, because she failed to yield the right-of-way. Respondent alleges that Grievant violated numerous safety policies, as well as a medication reporting policy, which endangered the student bus passengers and justified her termination. Grievant responds that her termination was unjustified and that she is entitled to an improvement plan to correct her performance. Respondent proved, by preponderance of the evidence, that Grievant was aware of the safety and medication-reporting policies cited by Respondent; she received training on them, and yet willfully disregarded them, jeopardizing the safety of her passengers and that her termination was, therefore, justified.

---

**KEYWORDS:** Policy; Payment; Inclement Weather

**CASE STYLE:** Mullins, et al. v. Hancock County Board of Education

DOCKET NO. 2016-1323-CONS (6/27/2017)

**PRIMARY ISSUES:** Whether Grievants are entitled to continuing incorrect compensation.

**SUMMARY:** The record of this case established that Respondent interpreted a previous policy to mean that bus operators would be paid from their regular start time on occasions when school was delayed for inclement weather even though the bus operators were not working during these hours. The Respondent modified its overtime policy and removed the provision for the payment of these additional hours. A board of education may change a policy by presentation to its members and an affirmative vote to change the same as occurred in this case. In addition, a board of education has the responsibility to correct an employee's pay when they are being paid improperly.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

---

**KEYWORDS:** Selection Process; Application; Arbitrary and Capricious

**CASE STYLE:** Pridemore, Jr. v. Department of Health and Human Resources/Bureau for Children and Families  
DOCKET NO. 2016-0676-DHHR (6/5/2017)

**PRIMARY ISSUES:** Whether Grievant proved the selection decision was arbitrary and capricious.

**SUMMARY:** Grievant is employed by Respondent as a Child Protective Services Supervisor in the Centralized Intake unit within the Bureau for Children and Families. Grievant applied for the position of Director of Centralized Intake, and was not selected for the position. Grievant asserted the selection process was flawed and that he was the most qualified applicant. Grievant failed to prove the selection decision was arbitrary and capricious or clearly wrong. The selection committee followed a logical process in the selection. The selection committee was qualified to make this decision, their selection was unanimous, and their decision was supported by substantial evidence. The successful candidate had much greater experience with the agency and with supervision, had previously supervised the exact classification that the Director would supervise, and was better able to convey her relevant leadership qualities in the interview. Accordingly, the grievance is denied.

**KEYWORDS:** Termination; Suspension; Drug and Alcohol Testing Policy; Random Drug Test; Hearsay; Mitigation

**CASE STYLE:** Roberts v. Division of Highways

DOCKET NO. 2017-1140-DOT (6/2/2017)

**PRIMARY ISSUES:** Whether Respondent had good cause to terminate Grievant's employment.

**SUMMARY:** Grievant was dismissed from his employment as a Transportation Worker 2 – Equipment Operator for testing positive for amphetamines and methamphetamines during a follow-up random drug test. In an earlier random test, Grievant tested positive for the same prohibited substances, and received a five-day suspension. Respondent established that the urine test was conducted in accordance with established testing procedures. Further, the Medical Review Officer provided credible expert testimony to refute Grievant's claim that the only possible basis for the test result was his use of a prescribed medication, CONTRAVE. Accordingly, Respondent demonstrated good cause for Grievant's dismissal by a preponderance of the evidence.

---

**KEYWORDS:** Annual Leave; Sick Leave; Work Shift

**CASE STYLE:** Balducci, et al. v. Division of Corrections/Huttonsville Correctional Center

DOCKET NO. 2016-1852-CONS (6/2/2017)

**PRIMARY ISSUES:** Whether Grievants proved that Respondent has violated any of policy or rule with regard to the accrual of annual and sick leave.

**SUMMARY:** Grievants are classified as Correctional Officers assigned to work regularly scheduled twelve hour shifts. Grievants allege that they are entitled to have a "day" considered to be twelve hours for purposes of calculating annual and sick leave pursuant to the West Virginia Division of Personnel's Administrative Rules. Record established that annual leave is awarded in increasing increments depending upon an employee's length of service. Grievants' argument regarding sick leave is also without merit. Full-time employees accrue 1.5 days per month of sick leave. Grievants have not proven by a preponderance of the evidence that Respondent violated, misapplied or misinterpreted the Division of Personnel's Administrative Rules regarding the accrual of annual and sick leave.

**KEYWORDS:** Discrimination; Transportation Worker Apprenticeship Program; Classification; Class A-CDL; Arbitrary and Capricious

**CASE STYLE:** Hamner v. Division of Highways

DOCKET NO. 2016-1630-DOT (6/15/2017)

**PRIMARY ISSUES:** Whether Grievant established a claim of discrimination.

**SUMMARY:** Grievant is an equipment operator, in the Transportation Workers 3 classification. Grievant argues that Respondent's requirement that he possess a Class A-CDL to advance in their recently implemented tier program is unreasonable. Grievant failed to demonstrate by a preponderance of the evidence that Respondent acted in an arbitrary and capricious manner by including the Class A-CDL license as a component of the Transportation Worker Apprenticeship Program. Grievant also failed to demonstrate that he was the victim of discrimination.

---

**KEYWORDS:** Selection; Application; Minimum Qualifications; Interview; Arbitrary and Capricious; Flawed

**CASE STYLE:** Greene v. Department of Health and Human Resources/Jackie Withrow Hospital

DOCKET NO. 2015-1615-DHHR (6/1/2017)

**PRIMARY ISSUES:** Whether Grievant proved by a preponderance of the evidence that Respondent's decision not to interview her for an Office Assistant II position was arbitrary and capricious, and that the selection process was flawed.

**SUMMARY:** Grievant applied for an Office Assistant II position. Grievant was not granted an interview for the same, and someone else was selected to fill the position. Grievant asserts that Respondent's actions were improper, arbitrary and capricious, and that the selection process was flawed. Respondent denies Grievant's claims, and argues that it was not required to interview Grievant for the position because she did not meet the minimum qualifications for the position. Grievant failed to meet the burden of proving her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

**KEYWORDS:** Discrimination; Temporary Upgrade; Supervising; Inmate; Job Description; Stipulated; Eligible

**CASE STYLE:** Melton v. Division of Highways

DOCKET NO. 2016-1405-DOT (6/7/2017)

**PRIMARY ISSUES:** Whether Grievant proved his claim of discrimination by a preponderance of the evidence.

**SUMMARY:** Grievant is employed by Respondent as a Transportation Worker 3 Mechanic. Grievant alleged that he was being denied the opportunity to receive temporary upgrades when he supervised inmate work crews when other employees were granted the same. Thus, Grievant raised a claim of discrimination. Respondent originally asserted that Grievant was not eligible to receive temporary upgrades because his job description included supervisory work. However, Respondent later conceded that Grievant was eligible to receive temporary upgrades for supervising inmate work crews, and agreed to pay him for four hours at the upgrade rate for inmate supervision performed on February 22, 2016. The parties did not dispute that Grievant supervised the inmate crew for eight hours that day, but Respondent argued that it was required to split the upgrade between Grievant and another employee who supervised the inmate crew that day; therefore, Grievant could only receive upgrade pay for four hours. Grievant failed to prove his claim of discrimination by a preponderance of the evidence. Grievant failed to prove that he was due compensation for inmate crew supervision performed prior to February 22, 2016. Respondent failed to present evidence to support its defense that Grievant could only be paid four hours for supervising the inmate crew on February 22, 2016. Therefore, this grievance is GRANTED IN PART, and DENIED IN PART.

**KEYWORDS:** Salary Range; Job Posting; Pay Grade; Classification; Reinstatement

**CASE STYLE:** Dennison v. Department of Veterans Assistance and Division of Personnel  
DOCKET NO. 2017-0901-DVA (6/23/2017)

**PRIMARY ISSUES:** Whether Grievant's hiring within the salary range of the posted classified position follows applicable policy, rule and law regarding reinstatement of a former State employee.

**SUMMARY:** Grievant was previously employed with a different West Virginia State agency. Grievant asserts that she should be reinstated to employment in State government making the same salary she made when she voluntarily resigned from employment. Grievant was hired for a classified full-time permanent employee position within the salary range of the posted position. Grievant did not establish by a preponderance of the evidence that she is entitled to the salary she was making when she voluntarily resigned from State government nearly six years ago, nor at the salary she was making as a temporary employee. Grievant's hiring within the salary range of the posted classified position follows applicable policy, rule and law regarding pay on reinstatement of a former State employee. The grievance is DENIED.

---

**KEYWORDS:** Motion to Dismiss; Threatened with Discipline; Relief

**CASE STYLE:** Thompson v. Board of Social Work  
DOCKET NO. 2017-2065-BBC (6/23/2017)

**PRIMARY ISSUES:** Whether this grievance is speculative and premature.

**SUMMARY:** Grievant is employed by Respondent as an administrative assistant. Grievant asserts she was told by her supervisor that her position required she have a working automobile, and that she would be fired if she did not immediately arrange to obtain an automobile. Grievant has not been demoted, dismissed from employment, or otherwise disciplined. Respondent moved to dismiss the grievance. Respondent's motion must be granted as the grievance is speculative and premature and the relief sought is unavailable. Accordingly, the grievance is dismissed.

**KEYWORDS:** Default; Level One Decision

**CASE STYLE:** Testement v. Regional Jail and Correctional Facility  
Authority/Southern Regional Jail

DOCKET NO. 2013-1846-MAPSDEF (6/27/2017)

**PRIMARY ISSUES:** Whether Respondent is in default.

**SUMMARY:** Grievant filed this grievance protesting his suspension. A level one conference was held, but no decision was provided to the Grievance Board or Grievant. Pursuant to the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board, the parties were notified by letter that, as no action had been taken in the grievance since the conference, the grievance would be dismissed unless timely written objection was made. Grievant made timely objection and Respondent was ordered to comply with the provisions of W. Va. Code § 6C-2-1, et seq. by providing the Grievance Board and Grievant with a copy of the level one decision or by scheduling a conference. Respondent failed to comply with order and failed to appear for the default hearing to demonstrate it was prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process. Grievant's request for default was not timely, but timeliness is an affirmative defense Respondent failed to raise. Respondent is in default. Accordingly, Grievant's claim for relief by default is granted. A second hearing must be scheduled to allow Respondent opportunity to demonstrate whether the remedy sought by Grievant is contrary to law or contrary to proper and available remedies.

**KEYWORDS:** Selection; Minimum Qualifications; Professional Experience; Arbitrary and Capricious

**CASE STYLE:** Tomes v. Division of Corrections/Salem Correctional Center  
DOCKET NO. 2017-1103-MAPS (6/28/2017)

**PRIMARY ISSUES:** Whether Grievant demonstrated that DOP's determination that she was not minimally qualified for the position at issue was arbitrary and capricious.

**SUMMARY:** This grievance was filed when Grievant was selected for a posted Corrections Program Specialist position, offered the position, and then informed that the Division of Personnel had determined she was not minimally qualified for the position. Another applicant was then placed in the position. The Division of Personnel concluded on review of Grievant's experience that she had not acquired the minimum six years of professional experience required to be minimally qualified for the position at issue. Grievant did not demonstrate that the Division of Personnel's determination that she was not minimally qualified for the position at issue was clearly wrong or arbitrary and capricious.

---

**KEYWORDS:** Suspension; Written Reprimand; Misconduct; Notice; Arbitrary and Capricious

**CASE STYLE:** McDaniel v. Division of Highways  
DOCKET NO. 2017-1404-CONS (6/30/2017)

**PRIMARY ISSUES:** Whether Respondent proved discipline was justified. Whether Respondent properly implemented a suspension after advising grievant it was contemplating a written reprimand.

**SUMMARY:** Grievant believes Respondent was not justified in disciplining him for his conduct at two meetings with his supervisors. Respondent proved that some discipline was justified for Grievant's misconduct at the meetings.

Grievant also argues that the District Engineer gave him a written reprimand and it was arbitrary and capricious for Respondent to subsequently give him a suspension for the same conduct. Grievant also claims that Respondent violated the Division of Personnel Administrative Rule by not giving him notice that a suspension was being considered prior to issuing the suspension. Grievant proved these defenses by a preponderance of the evidence.

**KEYWORDS:** Selection; Candidate Comparison Chart; Experience; Arbitrary and Capricious; Flawed; Qualified; Policy; Interview; Score; Qualifications

**CASE STYLE:** Williams v. Department of Health and Human Resources/Jackie Withrow Hospital

DOCKET NO. 2015-1577-DHHR (6/28/2017)

**PRIMARY ISSUES:** Whether Grievant proved by a preponderance of the evidence that the Respondent's selection decision for the Supervisor 2 Director of Maintenance position was flawed or arbitrary and capricious.

**SUMMARY:** Grievant was not selected for a Supervisor 2 Maintenance Director position. The selection process was arbitrary and capricious, but Grievant failed to prove he was the most qualified candidate. Where the selection process is proven to be arbitrary and capricious, but the Grievant fails to prove that he or she should have been selected for the position, the position should be reposted and a new selection process undertaken. Accordingly, the grievance is GRANTED IN PART and DENIED IN PART.

---

**KEYWORDS:** Motion to Dismiss; Timely; Working Days; Occurrence; Unequivocally; Excuse; Timeframe; Misleading; Effective Date

**CASE STYLE:** Palmer v. Department of Health and Human Resources/Office of Human Resource Management

DOCKET NO. 2017-2308-DHHR (6/30/2017)

**PRIMARY ISSUES:** Whether Respondent proved by a preponderance of the evidence that the grievance was untimely filed.

**SUMMARY:** Grievant filed a grievance challenging her dismissal from employment. Respondent has moved to dismiss the grievance as untimely as it was filed more than fifteen days following the occurrence of the event upon which the grievance is based. Grievant argues that the matter was timely filed, and that the dismissal letter prepared by Respondent was misleading. Respondent has proved by a preponderance of the evidence that the grievance was untimely filed. Grievant failed to demonstrate a proper basis to excuse her failure to file her grievance in a timely manner. Accordingly, Respondent's Motion to Dismiss is granted, and this grievance is dismissed.